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No. 06-213

FILED

OCT 2 0 2006

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IN THE

Supreme Court of the United States

LEWIS PERDUE,

Petitioner,

—v.—

DAN BROWN and RANDOM HOUSE, INC., IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The problem here is that the "No Expert" Circuits do *not* engage in balancing nor do they discuss Fed. R. Evid. 702. Instead, they uniformly hold that expert testimony concerning substantial similarity in literary works is legally *irrelevant* and so cannot be considered. None of the cases from those Circuits cited in the Brief in Opposition engages in balancing, except for one technology case.

That is the split. Those Circuits do not balance while others do. Both courts and treatise writers have recognized this split. The Brief in Opposition misrepresents the cases in order to discern a false uniformity that no court or treatise has ever before detected.

The "No Expert" Circuits wrongly call expert testimony irrelevant in literary cases like this one for several reasons. First, they say their "lay observer" test is unsuited for expert testimony. Second, they give judges the power to put themselves in the place of the lay observer and to decide questions of genre, fact versus fiction, stock themes and stock scenes as if they were questions of law rather than fact. As the Respondents' Brief in Opposition at 16, 20-21 argues, they say expert testimony should be excluded because judges "are fitted by training and experience to examine literary works," *quoting O'Neill v. Dell Publishing Co.*, 630 F.2d 685, 690 (1st Cir. 1980). *See also* Opposition at 2 ("district court more than competent"). Or they dismiss lists of similarities compiled by experts but then rely on lists of their own.[1]

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[1] While the Second Circuit has condemned such lists, *Litchfield v. Spielberg*, 736 F.2d 1356 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) does not condemn them. It says though lists can be subjective and unreliable the court has "relied on such lists of similarities in the past".

It makes no difference that they sometimes treat technology cases differently because, even when they do, they carefully limit the technology decisions so the holdings do not apply to literary or other types of cases. *See e.g., Computer Associates Intern., Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992).

This case dramatically demonstrates why that logic is wrong. Here, the expert affidavits materially differed from the district court's findings concerning genre, what is fact or fiction, stock themes, stock devices, timing and the unusual relevance of the characters' names. A comparison between Petn. at 7-12 and Petn. App. at 22a-35a and Opposition at 23-25 shows this.

The only way the district court could find no genuine issue of material fact was by ignoring the affidavit testimony, i.e., treating it as irrelevant. It simply did not consider that Constantine's alleged persecution of the divine feminine was fiction, not fact, or that the unique themes and scenes were not found elsewhere and were not required by the basic idea, or that specific plot elements appear at the same places in the two novels. Neither the district court nor Random House addresses any of these. Yet they should be "determinative."

Copyright law should not depend on the Circuit in which a case is filed. The expert testimony would have been admitted in Los Angeles but it was deemed irrelevant here. That is why Random House took the offensive and sued Perdue in New York. This Court should adopt a national rule that allows consideration of expert testimony throughout the country.

This Court should grant certiorari, entertain briefing and argument, and reverse the decision below.

STATEMENT OF THE CASE

Proceedings below. In the lower courts, Perdue consistently maintained the affidavits were relevant, admissible, and created genuine issues of material fact.[2] That he also said he should win without them does not matter, given the existing state of Second Circuit law. Opposition at 6.

More importantly, Random House consistently argued that the expert affidavits were irrelevant.

In the district court, it said: "The one thing that should not be given *any* weight on this motion is the testimony of Perdue's so called experts." Reply Memorandum of Law In Support of Plaintiff's Motion for Summary Judgment, 23-24.

In the Second Circuit, Random House said: "Where issue is substantial similarity expert's affidavit *is not properly considered.*" Brief for Plaintiffs-Counter-Defendants-Appellees and Counter-Defendants-Appellees, 54 (emphasis added).

This conflicts with the rule in the "Expert Allowed" Circuits, i.e., the Ninth, Fourth, Sixth, Eighth, and Eleventh Circuits.

Statement of Facts. Random House does not dispute Perdue's description of the record facts. Nor does it deny the similarities between the works. Petn at 7-12. It matters not that there are dissimilarities. In order for Perdue to go to the jury, all he has to establish is that a reasonable juror, viewing the facts in his favor, could find that Brown copied a portion of the plot expression in DAUGHTER OF GOD that was of substantial value to both works. *See* Petn. at 3-7.

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[2] *See* Petn. at 7 n.4.

Random House makes a significant factual error. That error demonstrates the usefulness of expert affidavits as an antidote to lawyer error. Random House wrongly attacks one of the affidavits for saying that in both books there is a gold key that does not turn a lock. Opposition at 6 n.2, 24. The expert is right and Random House is wrong.

In DAUGHTER OF GOD, as in THE DAVINCI CODE, a murdered art expert leaves a painting named for the Madonna in which a gold bar is hidden. In both novels, when the bar slides into a slot, it allows access to historical evidence. DAUGHTER at 367-368. DAVINCI at 177-178. So in both books the gold bar is a "key" that works without being turned. Random House misled the district court on this point. *See* Petn. App. 23a n.7. If the Court had honored the affidavits, this would not have happened.

Random House also incorrectly accuses Professor Olsson of failing to give any page cites. But Petn. at 10-11 shows this is untrue, because it quotes his page cites.

Finally, Perdue's ambiguous statement in DAUGHTER concerning the factual nature of his book is itself a device as old as the English novel. *See* D. Defoe, ADVENTURES OF ROBINSON CRUSOE, MARINER OF YORK (1719).

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The conflict is between Circuits that say expert testimony is "irrelevant" to substantial similarity, and those who say it can be both relevant and admissible.

Random House does not dispute that treatises and Circuit Courts say there is a conflict among the Circuits. *See* Petn. at 13-14. Nor does it even examine most of the cases that demonstrate that conflict. Petn. at 13-19.

Instead, it wrongly claims all courts simply exercise their discretion under Fed. R. Evid. 702 to determine whether expert testimony is admissible in each case. But most of the cases it cites come from "Expert Allowed" Circuits, and the other cases cited fail to support its argument.

The "No Expert" cases cited at Petn. 14-15 hold that expert testimony is unequivocally "irrelevant." For the Court's convenience, the quotations from those cases which express the "irrelevance" rule are collected here, with footnotes addressing the additional cases Random House has cited from the "No Expert" Circuits.

Second Circuit. The court still adheres to the pre-Rule 702 standard laid down in *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946):

> If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue . . . the test is the response of the ordinary lay hearer; accordingly, on that issue, 'dissection' and expert testimony are irrelevant"

Id. at 468 (footnote omitted). *See also Computer Associates Intern., Inc. v. Altai*, 982 F.2d 693, 713 (2d Cir.

1992) ("expert testimony is . . . 'irrelevant' and not admitted"); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 51 (2d Cir. 1985) ("some confusion surrounds the standard to be applied" but Second Circuit follows *Arnstein*, not [the Ninth Circuit]).[3]

First Circuit. Segrets, Inc. v. Gillman Knitwear Co., 207 F.3d 56, 66 n.11 (1st Cir. 2000) ("we reiterate our rule that expert testimony on the topic of 'substantial similarity' is not permissible").[4] The Opposition cites *O'Neill v. Dell Publishing Co.*, 630 F.2d 685, 690 (1st Cir. 1980) for exactly the proposition other Circuits reject, i.e., that expert testimony should be excluded because judges "are fitted by training and experience to examine literary works."

Third Circuit. Kay Berry Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 208 (3d Cir. 2005) ("the fact-finder must decide without the aid of expert testimony . . . whether the copying is 'illicit' or 'an unlawful appropriation' " (citation omitted)); *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62, 66 (3d Cir. 1978) (expert testimony "irrelevant when the issue turns to unlawful appropriation").[5]

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[3] Two other Second Circuit cases the Opposition at 18,22 cites do not involve expert testimony. *See Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir. 1980) *cert. denied*, 449 US. 841 (1980) (no expert testimony offered); *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996) (no expert testimony offered).

[4] The Opposition correctly says that *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 116 (1st Cir. 2006) has softened the *Segrets* rule, but it did so only for "areas of technology". In *Johnson v. Gordon*, 409 F.3d 12 (1st Cir. 2005), a music case, both sides used experts without objection.

[5] In *Whelan Assocs. Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), a computer program case, both sides relied on expert testimony and its admissibility was not an issue.

Fifth Circuit. Positively Black Talk, Inc. v Cash Money Records, Inc., 394 F.3d 357, 374 (5th Cir. 2004) (Fifth Circuit does not follow Ninth Circuit): *Sahuc v. Tucker*, 300 F. Supp. 2d 461, 465 n.1 (E.D. La. 2004) (because standard is layperson standard, expert testimony is to be given "little weight").

Seventh Circuit. Atari, Inc. v. North American Philips Consumer Electronics Corp, 672 F.2d 607, 614 (7th Cir. 1982) (substantial similarity test does not involve analytic dissection and expert testimony, quoting *Arnstein*).[6]

Federal Court of Claims. Trek Leasing, Inc. v. United States, 66 Fed. Cl. 8, 18 (Ct. Cl. 2005) ("[s]ince the ordinary observer test is an objective one, expert testimony may not be used to determine substantial similarity.").

With only one exception for computers, these cases *never mention* Fed. R. Evid. 702. Their conclusion that expert testimony is irrelevant forecloses all further inquiry. That exception proves the rule. In *Computer Associates Intern, supra,* the Second Circuit said that in a computer design case it would allow expert testimony because of technical issues. But said its ruling would not apply to literary works because of the "well-established general rule in this [C]ircuit." *Id.* at 713.

The Random House brief does not offer any hope that the Second Circuit or other Circuits will abandon this analysis. It cites no case in which the Second Circuit has denied summary judgment on substantial similarity

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[6] The Opposition cites *Susan Wakeen Doll Co. v. Ashton-Drake Galleries*, 272 F.3d 441 (7th Cir. 2001), but there both sides used experts on doll construction without objection. In *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502 (7th Cir. 1994), no experts were offered. In *Gaste Matieu v. Tony Stone Images/Chicago Inc.*, 255 F.Supp.2d 838, 855 n.14 (N.D. Ill. 2003) the court said expert testimony "cannot create material factual issues."

because of an expert affidavit. To the contrary, the rule in the Second Circuit is so "well-established" that it has all but quit publishing its substantial similarity decisions. *See* U.S.Ct. of App. 2nd Cir. § 0.23, 28 U.S.C.A.[7]

That the cases from the "Expert Allowed" Circuits exercise discretion when admitting expert testimony is predictable, and in no way diminishes the conflict.[8]

2. If considered, Perdue's expert affidavits create genuine issues of material fact for a jury to resolve.

A court reviews summary judgment decisions as a matter of law. The facts are to viewed in the light most favorable to the non-moving party, i.e. Perdue. *See* Petn at 12. A court commits error if it grants summary judgment where there is a genuine issue of material fact. Fed. R. Civ. P. 56.

The purpose of the "substantial similarity" test is to protect original expression that makes a material contribution to both works. In *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340, 348 (1991), this Court held that even an arrangement of unprotected facts would itself be protected if there were a "minimal degree of creativity" in the arrangement. The question is whether the defendant has taken "material of substance

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[7] *Hudson v. Imagine Entertainment Corp.*, 128 Fed. Appx. 178 (2d Cir. 2005); *Kroencke v. General Motors Corp.*, 99 Fed. Appx. 339 (2d Cir. 2004); *Scholastic Inc v. Staffer*, 81 Fed. Appx. 396 (2d Cir. 2003).

[8] *Ninth Circuit. Funky Films, Inc. v. Time Warner Entertainment Co.*, 462 F.3d 1072 (9th Cir. 2006) (expert testimony presented but given little weight); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179-80 (9th Cir. 2003) (court balances and finds experts from both sides are not helpful); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000) (expert testimony "often" needed); *Brown Bag Software v.*

and value" from the plaintiff's work. *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996). Where actual copying is shown or admitted, the standard for "substantial similarity" is lower. *See Swirsky v. Carey*, 376 F.3d 841,844 (9th Cir. 2004) (reversing summary judgment). Even if the copied portion is relatively small in proportion to the entire work, if qualitatively important, the finder of fact may find substantial similarity. *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (reversing summary judgment).

A jury is the body to decide disputed issues of material fact in copyright disputes. *Fellner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

The Opposition completely discards its burden to view the facts in the light most favorable to Perdue. Its vehement denial that the gold piece in each novel is a "key" is but one example.

As the Petition at 7-12 demonstrates, the affidavits from literary experts conflict with the district court's findings on every issue the Opposition deems important. Its footnoted claim that Perdue "admits" the affidavits add nothing reflects bold but entirely wishful thinking. Opposition at 6 n.3. A reasonable juror could believe, based on the affidavits, that Brown copied Perdue's fiction concerning Constantine's persecution of women. Such a juror could find that not only is the idea of both

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Symantic Corp., 960 F.2d 1465, 1474 (9th Cir. 1992) ("expert opinion is relevant"); *Berkick v. Crichton*, 761 F.2d 1289 (9th Cir. 1985) (expert testimony allowed).

Fourth Circuit. Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 803 (4th Cir. 2001) (discusses "intended audience" standard).

Tenth Circuit. Gates Rubber Co. v. Bando Chem. Indus. Ltd., 9 F.3d 823, 835 (10th Cir. 1993) (expert testimony "would provide substantial guidance").

novels—suppression of evidence of the divine feminine that threatens the Catholic Church—original to Perdue, but that Brown took numerous important plot elements from Perdue and that these elements were not "stock," e.g. the "idea" did not require that a message be left in a painting containing a gold bar that worked as a key.

In short, a reasonable juror could find that Brown took "material of substance and value" from Perdue's novel, and that he owes Perdue compensation to the extent he did that.

In sum, the Circuits are not just in conflict. They are in deadlock. The issue is important both to literary America as well as to the administration of the federal Copyright Act. The United States needs a uniform rule. This Court should give it one.

CONCLUSION

For these reasons, petitioner Perdue prays that this Court will grant the petition, reverse the Second Circuit, and remand for further consistent proceedings.

Respectfully submitted,

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